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RESPONSE REQUESTED

No. 89-1345

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

BEVERLY HILLS SAVINGS
& LOAN ASSOCIATION,
SOUTHLAND CORPORATION,

Petitioners,

vs.

MELVIN MEMPHREY CARTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

MELVIN MEMPHREY CARTER

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TOPICAL INDEX

	Page
STATEMENT OF THE CASE	1
ARGUMENT	11
CONCLUSION	16

TABLE OF AUTHORITIES

Cases

Beaudry Motor Co. v. ABKO Properties, Inc.
780 F.2d 751 (9th Cir. 1986) 13

Caperton v. Beatrice Pocahontas Coal Co.,
585 F.2d 603 (4th Cir. 1978) 12

Calhoun v. United States,
647 F.2d 5 (9th Cir. 1981) 13

Healy v. Pennsylvania R. Co.,
181 F.2d 934 (3rd Cir. 1950)
cert. denied, 340 U.S. 935,
71 S.Ct. 490, 95 L.Ed. 674 (1951) 11

United States v. Indrelunas,
411 U.S. 216, 93 S.Ct. 1562,
36 L.Ed.2d 202 (1973) 11

Rules

Federal Rules of Appellate Procedure,
Rules 4(a), 4(a)(6) and 79(a) 11

Rule 58 11, 14, 15

Rule 73(a) 12

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

In December, 1979, Petitioner, Beverly Hills Savings and Loan Association, refinanced the property located at 1351 South Burnside Avenue, Los Angeles, California, which had been previously purchased by the Carters for the purpose of Respondent to invest into a

Bail Bond Business at 70% of it's appraised value.

Mrs. Carter found that Beverly Hills Savings & Loan Association had altered the percentage rates in the Note and Deed of Trust. Mrs. Carter complained about the same. When Mrs. Carter complained, Mrs. Carter was given the choice of leaving the loan as it stood or Beverly Hills Savings and Loan Association would recall the loan. (This document can furnish the Court with proof of the same as soon as Respondent can get the same out of storage.)

In January, 1982, the Carters agreed to divorce, and the loan went into default upon the Promissory Note and Deed of Trust. In or about May or June, Petitioners sent to Respondent a Notice of Default, sometime thereafter in order to protect his interest.

The Respondent filed a Chapter 13 in or about August 24, 1982, and the same was

dismissed in September, 1982, because the Respondent failed to submit the two payments that were required to be submitted.

This Respondent filed another Chapter 13 on October 6, 1982, through an attorney who failed to appear, failed to submit the payments, and has not been seen since. (Investigate the files.) This Chapter 13 was dismissed on October 27, 1982, #LAX 8216614-BR. (See Exhibit , Page 2.)

This Respondent filed another Chapter 13 on November 22, 1982. This matter was dismissed January 6, 1983, for errors in calculation of interest and trustee fees, #LAX 8220220. At the hearing, Attorney Bernard M. Reesen and Respondent agreed to an Amendment in open Court on March 21, 1983, that he, as the attorney for the petitioner, would agree to withdraw the objection to the Chapter 13 plan. (See Exhibit , and made a part of this response.)

On or about April 11, 1983, the Petitioners and Respondent agreed in open Court to permit the Court to accept the Amended Chapter 13 on the following terms and conditions:

1. Not later than 1:30 p.m., the Respondent would submit to the Court $3,556.67.

2. That the future payments would be paid to Shearson American Mortgage Company at 1201 East Highland Avenue, Suite D, San Bernardino, California 92408. The aforementioned company is/was an agent of Beverly Hills Savings & Loan.

3. Shearson American Express Mortgage Company would serve on the Respondent a Notice to Proceed with the sale and Respondent would have 15 days to respond to the Court if so desired, if Respondent defaulted.

4. That this Agreement would be in force for a period of 36 months.

5. On or about April 25, 1983, this Chapter 13 was approved by the Court.

6. On or about April 25, 1983, the Court received the amount of $3,558.64 as agreed.

On or about May 5, 1983 (some 10 days after), this Respondent submitted to Shearson American Express Mortgage Company (an agent of Beverly Hills Savings & Loan Association) the sum of $1,139.55 as agreed. However, Shearson American Express Mortgage Company rejected the aformentioned stating they had not received the files back from Attorney Bernard M. Ressen. This Respondent submitted the same to Attorney Bernard M. Ressen, the attorney who represented Petitioners, whereas this amount was cashed by Shearson American Express Mortgage Company or it's representatives.

On or about June 8, 1983, this Respondent submitted (again) to Shearson American

Express Mortgage Company (as agent for Beverly Hills Savings & Loan Association) the amount as agreed. However, the amount was rejected again by Shearson American Express Mortgage Company. They stated that the file had not been submitted to them. It was suggested that the Respondent submit the payments to Beverly Hills Savings & Loan Association at office in Beverly Hills, California, and again to Attorney who was no longer with the law firm.

Shortly thereafter, a for sale sign was posted on the premises at 1351 S. Burnside Avenue, Los Angeles California. On or about September 7, 1983, the property went for sale without the creditors returning to Court and obtaining the lift of the automatic stay even though the debtor filed and served on the creditors another Chapter 13.

Shortly thereafter, this Respondent filed a Motion to Dismiss the Amended

Chapter 13.

Shortly thereafter, this Respondent filed a lawsuit in the State Court and served the Petitioners. Instead of the Petitioners filing an Answer to the Complaint, the Petitioners filed a Motion to Transfer the Case to the United States District Court without notifying the Respondent when the Respondent went to file a Request for a Default Judgment. When this Respondent became aware that the Petitioners had filed a response to the Respondent's Complaint sometime later the Petitioners filed an Answer to the Complaint. This was approximately some 45 days or 60 days (take judicial notice).

After the Respondents received a photocopy of the answer from the Court, This Respondent received a Notice for the Respondent and Petitioner to have a conference. Shortly thereafter, the Petitioners and the Respondent met in Court for a day of Discovery.

and at that time this Respondent attempted to explain to Judge Hupp what had happened. Judge Hupp completely ignored the Respondent's explanation. However, Judge Hupp did recommend that the Petitioners sell the two properties back to the Respondent.

When the Petitioners refused to converse with the Respondent, this Respondent obtained an attorney and the Petitioner agreed to sell the property lacated at 1351 South Burnside back to the Respondent (see Exhibit , and made a part of this complaint.

This agreement had the following provisions:

1. That the Respondent would repurchase the property located at 1351 South Burnside, Los Angeles, California 90019 for the sum of $79,000.

2. That Respondent forfeit his rights in the property lacated at 1269 S. 125th and 1351 South Burnside Avenue.

3. That Respondent would forfeit his rights to $3,778.17 that Petitioners were holding from American Bonds Insurance.

Petitioners orally agreed that Respondent would use the $3,778.17 toward the down payment. However, Judge Hupp refused to sign the Agreement and took jurisdiction over the case for 60 days.

This Respondent obtained the following:

1. An appraisal of the property in the amount of $105,000.00.

2. A loan in the amount of $75,221.83, using the $3,778.17 draft as a down payment of the $79,000.00.

3. Respondent's credit was approved.

4. Respondent opened escrow and requested Petitioners to deposit the draft into escrow.

Petitioners refused to deposit the draft into escrow as requested claiming the draft had been misplaced.

This Respondent went to Miami, Florida, the Headquarters of American Bonds Insurance Company to file a Stop Payment on the draft and to have a new draft issued. The Respondent arrived in Miami, Florida, only to find that the draft had been cashed.

When this Respondent returned to Los Angeles and informed the Petitioners of his finding, the Petitioners replied "The draft had been found and sent to Mission Viejo, California, Beverly Hills Savings & Loan Association's Headquarters, for their review."

After waiting for a response from Beverly Hills Savings & Loan for some four (4) months, this Respondent filed a complaint through the State of California Department of Insurance, requesting copies of the draft and shortly thereafter American Bonds Insurance sent this Respondent photocopies of the draft which had been cashed.

ARGUMENT

A judgment or order is not entered within the meaning of Rule 4(a) unless it complies with Rules 58 and 79(a). Fed.R. App. 4(a)(6). The requirements of these rules must be "mechanically applied." United States v. Indrelunas, 411 U.S. 216, 222, 93 S.Ct. 1562, 1565, 36 L.Ed.2d 202 (1973).

In Healy v. Pennsylvania R. Co., 181 F.2d 934 (3rd Cir. 1950), cert. denied, 340 U.S. 935, 71 S.Ct. 490, 95 L.Ed. 674 (1951), the district court filed a memorandum of opinion which concluded with the sentence, "The motions...are denied." The docket entry read:

> April 12, 1949. Memorandum Opinion...denying motion to set aside verdict or for new trial, filed.

The court held that this did not constitute compliance with the separate entry requirement and that Amended Rule 73(a) contemplates both an ORDER and its entry in the docket.

Similarly, in Caperton v. Beatrice Pocahontas Coal Co., 585 F.2d 683 (4th Cir. 1978), the entry of the final judgment itself was defective. The notation on the docket sheet read:

> 9-30-76 Opinion and Order dated 9-26-79 dismissing these four cases for lack of subject matter jurisdiction. CIV. O. B. #33, p. 18. Certified copies hereof mailed to counsel of record.

The court determined that "this notation refers to the district court's tantative opinion, as opposed to any separate judgment..."

In the case before the honorable Court, the entry in the civil docket book is as follows:

3-15-85 sb 18.crt dism actn
reason of settlmnt
& retn jurdctn 60 re-
open if settlmnt not
completed (ENT 3-26-85)
MD JS 6 Mld cpys

Relying on Calhoun v. United States, 647 F.2d 6 (9th Cir. 1981), the 9th Circuit correctly held that "this entry does not show that a separate order was filed and entered as required by Rule 58, but rather that the document entered was the minute of the action taken by the judge at a pretrial conference."

In Beaudry Motor Co. v. ABKO Properties, Inc., 780 F.2d 751 (9th Cir. 1986), relied on heavily by the petitioner, the entry in the civil docket book is as

follows:

1/05 62 M/E(ACM): For reasons set forth in Dft resp to pltf Mots for New Trial and to Amd Cmplt, ORD that Pltf Mots are DENIED.

(cc: Mandig, White, ACM)

In holding that the minute order satisfied the separate document requirement of Rule 58, the court stated that the "copy of the minute order with its language 'IT IS ORDERED' clearly put plaintiff's counsel on notice that an order had been entered..."

In this case, we have a civil minute order without the imperative "IT IS ORDERED." Therefore, the 9th Circuit correctly held that the minute order does not satisfy the requirement of a separate order within the meaning of Rule 58. Consequently, petitioner's writ of certiorari should be denied.

Petitioner correctly points out that Rule 58 was designed "to make the rendition and entry of judgment simple, easy, and prompt" and to remove previous uncertainty about the proper time to appeal or to file post-judgment motions. What he vonceniently failed to point out is that this honorable Court has determined that a mechanical application of Rule 58 will best achieve both laudable objectives of the rule. Moreover, it is only the sloppy procedure of trying to make court minutes suffice for a separate order that unnecessarily raises the issues on this appeal.

For the foregoing reasons, the Petitioners request should be denied with costs.

DATED: June 8, 1990

Respectfully submitted,

MELVIN MEMPHREY CARTER
In Propria Personna

APPENDIX

CONCLUSION

In view of the facts as before mentioned, the Chapter 13 had been approved by the Judge who was presiding over the Bankruptcy Court. Payments were being made as agreed by the Petitioners and the Respondent. It would appear that after the Petitioners proceeded and sold the two properties at 1351 South Burnside Avenue, Los Angeles, California and 1269 East 125th Street, Los Angeles, California, not only did the Petitioners violate the Bankruptcy Code, Section 262, they violated this Respondent's Constitutional Right, guaranteed by the United States Constitution, that "no one shall be deprived of his or her property without due process of law."

It is also clear in the Constitution of the State of California "that no man or woman shall be deprived of his property

without due process of law."

Furthermore, after the petitioners approached the Respondent and the two agreed that Petitioners would resell and Respondent would repurchase the property located at 1351 South Burnside Avenue, Los Angeles, California for the sum of $79,000.00, providing this Respondent would waive his rights to the equity and interest in the amount of $41,000.00, in the property located at 1269 East 125th Street, Los Angeles, California, that the sum of $3,778.00 would be applied toward the purchase price of the Burnside property that the Insurance Company had released to the Petitioners for repairs which the Respondent had made. This amount ($3,778.00) was to be deposited in escrow upon the following germs and conditions: that this Respondent would obtain an F.H.A. loan to compensate the petitioners in the amount of $75,220.00.

This Respondent obtained an appraisal in the amount of $102,000.00 to open escrow on the property located at 1351 South Burnside Avenue, Los Angeles, California. This Respondent's credit was approved and this Respondent requested that the Petitioners deposit the draft in the amount of $3,778.00 into escrow for closing the same.

The Petitioners contended that the draft had been lost or misplaced. This Respondent then went to Miami, Florida, the home office of American Bankers Insurance Company, in order to put a stop payment on the draft in order to expedite the transaction, only to find that the draft had been chashed and the funds had been converted to the Petitioners.

This Respondent requested that the Petitioners replace the draft in the amount of $3,778.00 with a cashier's check. The Petitioners wilfully, intentionally,

deliberately, and without justification or excuse, refused to replace the draft with a cashier's check, and instead called Judge Harry L. Hupp's deputy and informed him that the matter had been settled. Therefore, Judge Harry L. Hupp called the calendar and dismissed the action because the matter had been settled. The Petitioners well knew that the same was a fraud on the Court and the Petitioners did not inform the attorney representing the Respondent of the action and wilfully, intentionally, and deliberately had the Respondent believe that the Petitioners in Mission Viejo, California were reviewing the offer and that the Respondent would be hearing from the Petitioner in a very short time. After waiting for the Petitioners to return the cashier's check in leu of the draft, not knowing that the matter had been dismissed until this Respondent became suspicious because of the

long length of time, this Respondent filed a motion to return this matter back to the State Court and at the hearing this Respondent found that his motion was moot.

This Respondent then filed a motion to reopen the case which was then denied. At that time this Respondent filed his Notice of Appeal. The Ningh Circuit Court of Appeal reversed the matter in favor of the Respondent. Then Petitioners filed a motion for rehearing en banc which was denied.

The stay in the Bankruptcy Court was never removed, nor was it lifted.

THEREFORE, this Respondent requests of this Court that the petiton for a writ of certiorari be denied; that this Court order Petitioners to return the property located at 1351 South Burnside Avenue, Los Angeles, California to Respondent, or in the alternative, this Court demand that the

specific performance be carried out; that the Petitioners return to this Respondent the sum of $41,000.00 for equity and interest that he lost in the property located at 1269 East 125th Street, Los Angeles, California; that the amount of $3,500.00 be returned to this Respondent for the money paid at the time this Respondent entered into the agreement at the Bankruptcy hearing; (that which the Petitioners converted to themselves); for punitive damages at this Court deems proper and fair; and, that this matter be turned over to the proper authorities for a full investigation.

DATED: June 8, 1987

Respectfully submitted,

MELVIN MEMPHREY CARTER
In Propria Personna